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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-436

FEDERAL COMMUNICATIONS COMMISSION,
Petitioner,

v.

MCI TELECOMMUNICATIONS CORPORATION, MICROWAVE COMMUNICATIONS, INC. and N-TRIPLE-C INC.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR *AMICUS CURIAE* THE PUBLIC UTILITIES COMMISSION OF OHIO

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OPINIONS BELOW

Now comes the Public Utilities Commission of Ohio (hereinafter referred to as Commission) by its Counsel, William J. Brown, Attorney General of Ohio, and submits as provided by Rule 42(4) of the Rules of this Court, the following Brief *Amicus Curiae* in support of the Petition for Writ of Certiorari filed by the Federal Communications Commission. The opinion of the United States Court of Appeals for the District of Columbia Circuit, dated July 28, 1977, is not yet reported but is attached as Appendix A to the Petition

of the Federal Communications Commission (FCC). The decision of the FCC is reported at 60 F.C.C. 2d 25 and is attached to the FCC's Petition as Appendix B.

THE INTEREST OF THE PUBLIC UTILITIES COMMISSION OF OHIO

The Commission is the agency statutorily vested with the jurisdiction to regulate and supervise, *inter alia*, the communications common carriers in Ohio. Included within the Commission's jurisdiction is the power and responsibility to regulate the level of telephone rates for local exchange and intrastate toll services. The Ohio Legislature has prescribed that the Commission carry out that regulation and supervision in such a manner as to insure that all Ohioans shall enjoy adequate telephone service at just and reasonable rates.[1]

The Commission is vitally concerned with this Court's disposition of the Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit for the reason that the decision of the Circuit Court, if not reversed, may well have a potentially devastating effect on the ability of the Commission and other state regulatory commissions to carry out their statutory obligations. The Commission's Brief *Amicus Curiae* will address the regulators' problems and the effect that the decision of the Court below will have on users of telephone service in Ohio and throughout the nation.

STATEMENT OF THE CASE

This case involves the creation of competition in the provision of Message Toll Service (MTS) without a determination by the FCC or the Court that competi-

[1] Section 4905.22, Revised Code of Ohio

tion is in the public interest. At the time of the decision of the Court below, MTS was furnished only by companies affiliated with the Bell System together with the independent telephone companies (those not affiliated with the Bell System) over an integrated nationwide network. The companies of the two segments of the telephone industry furnish their respective portions of the network on an interconnected basis and the industry has the obligation of serving every person, wherever located, who desires MTS service. Whether the monopoly status of MTS is *de jure* or *de facto* is not important to this discussion. MTS did until now occupy a monopoly status.

In 1969, the FCC began to experiment with competition limited to the provision of interstate private line service theretofore furnished only by the telephone industry as a common carrier offering.[2] As the experiment evolved, the FCC created a new category of common carriers, christened Specialized Common Carriers typified by Respondents (collectively referred to as MCI) and found a "general policy in favor of the entry of new carriers in the specialized communication field[3] . . .", and further that it was not necessary to hold hearings to restrict, ". . . new entry in any particular area to only one *private line* applicant".[4] *(emphasis added)*. The FCC and the several Courts of Appeals decisions, until now, have consistently considered Specialized Common Carriers to be restricted to the private line field. These newly created Specialized Common Carriers have no obligation to serve the public

[2] *Microwave Communications, Inc.*, 18 F.C.C. 2d 953, recon. denied, 21 F.C.C. 2d 190 (1970)

[3] 29 F.C.C. 2d at 920

[4] 29 F.C.C. 2d at 926

other than in the routes selected by them. Although the effects of serving these select customers in a relatively small segment of the communications market have not yet been fully realized, suddenly the experiment is enlarged to encompass the entire market.

Competition is not new in the history of the telephone industry. Early in this century, telephone companies vigorously competed for territory and customers. Companies duplicated the facilities of each other in serving the same territory and oftentimes refused to interconnect their respective lines to provide the service required by the public. The chaos created by competition led to pervasive regulation of the telephone industry in the furtherance of the public interest. To cope with the chaotic situation, the states enacted legislation intended to eliminate competition for customers and territory [5] and to require telephone companies to interconnect their facilities and form continuous lines.[6] At a later date, Congress, in enacting the Communications Act of 1934, gave the FCC the power to require the companies,

> ". . . to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the division of such charges, . . ." Section 201(a).

Thus, the integrated nationwide network, is at least in part, the result of Federal and state legislative action. It is this legislatively mandated network that the decision of the Court below might damage to the ordinary telephone user's detriment.

The decision of the Court of Appeals in this case held that the FCC erred in ordering MCI to cease and

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[5] e.g. Section 4905.24, Revised Code of Ohio

[6] e.g. Section 4905.50, Revised Code of Ohio

desist offering a service called "Execunet".[7] The FCC's order was based on a finding that Execunet was not a private line service but instead a service that was essentially the same as MTS offered by the telephone industry over the industry's integrated network and as such was not within the limited authorization previously granted MCI.

The Court of Appeals, in reversing the FCC's order, held that MCI was authorized to provide Execunet and any other service which would be adequately provided over its facilities, that MCI's authority was not limited in any way despite the fact that the FCC had not made a determination that such unlimited authority would be in the public interest and that it could not be limited unless and until the FCC appropriately found that such unlimited authority was contrary to the public interest.

REASONS FOR GRANTING THE WRIT

A. Conflict with other decisions.

The Commission fully supports the very careful analysis presented by the FCC in its Brief with respect to the irreconcilable conflict between the Execunet decision and decisions of this Court and Court of Appeals involving new entry into the communications market. The analysis and argument involving such conflicts will not be duplicated in the Commission's Brief *Amicus Curiae*.

B. Importance of this case to the user of telephone service in Ohio and throughout the nation.

The Commission, other state regulatory commissions and the FCC have slowly and painstakingly molded the

[7] Execunet, MTS and private line service referred to throughout this Brief *Amicus Curiae* are fully described in the briefs of the parties.

telephone industry's rate structure to serve the public interest. If that structure is to be changed, it should be done only if and when the evidence supports the conclusion that the change would serve that interest. The Court of Appeals declined to consider that question specifically saying that it had not had to consider whether competition in the MTS field was in the public interest. The decision creates competition not because it is in the public interest but solely because the Court determined that the FCC could have limited MCI's authority to the provision of private line service under Section 214 of the Communications Act but failed to do so in a manner considered appropriate by the Court.

Despite the Court's finding that there had not been a public interest determination by the FCC and despite the Court's refusal to consider whether the public interest would be served by this new competition, the effect of the Court's decision is to mandate competition in the MTS field. The decision establishes the principle, not heretofore enunciated, that competition throughout the communications market is permissible until and unless it is found to be against the public interest. The establishment of this principle is in direct contradiction of this Court's finding that, "The Act [Federal Communications Act of 1934] by its terms *prohibits* competition by those whose entry does not satisfy the 'public interest' standard".[8] *(emphasis added)*. The effect of the Execunet decision would be to rewrite that finding to say, "The Act by its terms *permits* competition *until* those who have entered are found not to satisfy the 'public interest' standard." Such a startling disregard of this Court's finding should not be allowed

[8] *F.C.C. v. RCA Communications, Inc.*, 346 U.S. 86 at p. 96 (1953)

to prevail. This concept, flying as it does in the face of considered regulatory representation in a sensitive area of Federal-state relations, comes as a complete surprise to the Commission and can have a most serious impact on the Commission's ability to carry out its statutory obligations.

The Commission is not here concerned with the effect on the private financial interests of MCI, the Bell System or the independent telephone companies. Instead, it is concerned because the decision may adversely affect basic service rates which the Commission has, until now, been able to maintain at relatively low levels. It is the impact that the lower Court's decision might have on the rates for residential and small business users in Ohio and nationwide that has motivated the Commission to file this Brief *Amicus Curiae*. This group is served by Bell System and independent telephone companies.

Most telephone plant is used in common for interstate and intrastate services. Toll service revenues (which include MTS—the type of service furnished by MCI's Execunet) are made available for the support of intrastate investment through an allocation process cooperatively developed by the FCC and the state regulatory commissions.[9] This process separates the investment, expenses and revenues between the state and Federal jurisdictions and is based on the relationship

[9] See *In the Matter of Prescription of Procedures for Separating and Allocating Plant Investment, Operating Expenses, Taxes and Reserves Between the Intrastate and the Interstate Operations of Telephone Companies*. 26 F.C.C. 2d 247, 248 (1970). See also *Washington Utilities & Transportation Com'n v. FCC*, 513 F. 2d 1142 (1975) for a description of the separations process.

of interstate and intrastate use. Since a service like Execunet will by-pass the integrated networks' interstate circuits while using the telephone industry's intrastate facilities to both originate and terminate calls, it will not only diminish the interstate portion but at the same time, by creating intrastate use where it did not previously exist, will increase the intrastate portion. This will seriously distort the separations process and result in a substantially smaller flow of interstate MTS revenues to support intrastate facilities, thus creating upward pressure on basic service rates.

The telephone industry's toll service revenues and the separations process are most important to the state regulators in their efforts to keep basic service rates low. The annual reports of telephone companies required to be filed with the Commission show that the toll service revenues of Ohio's Bell System companies (Ohio Bell and Cincinnati Bell) comprise approximately 38% of the total revenues of those companies and that the toll service revenues of the independent telephone companies represent an even higher percentage. For example, one of the larger independent telephone companies in Ohio derives approximately fifty percent of its total revenues from such service. Even more substantial can be the effect on the customers of smaller independent companies. These companies often derive a larger portion of their total revenues from toll service, e.g., over 60% of the total revenues of one small Ohio independent telephone company comes from toll service. Any diminution of this revenue will create additional pressure for basic service rate increases.

The Specialized Common Carriers, such as MCI, have no obligation to serve the public other than in the

routes selected by them and any advantage to the large business user of such service is at the expense of the residential and small business user of telephone industry services.

Under the existing telephone industry MTS rate structure developed over the decades of regulation, one rate applies for calls between equidistant points within a state and one rate applies for calls of equidistance between states. These rates reflect average costs, i.e., do not reflect the substantially different costs applicable to each route. Since the routes selected by the Specialized Common Carriers duplicate the most profitable routes in the nationwide integrated telephone industry network, we can reasonably expect the telephone industry's response to such competition to be a departure from cost and rate averaging. Walter Hinchman, Chief of the FCC's Common Carrier Bureau, describes this response as follows:

> "Message Telephone Service involves a great deal of Nationwide averaging of rates. If we start having competition in that part of the business, the deaveraging of basic message telephone service will have to take place." [10]

Attempts to implement such deaveraging have already begun in the interstate private line field.

If rates must be determined in relation to the cost of service in the various routes, the Commission and other state regulatory commissions are suddenly faced with the very serious requirement of reorienting the

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[10] Testimony of Walter Hinchman, Chief of the Common Carrier Bureau, Oversight Hearing on Domestic Common Carrier Regulations, Subcommittee on Communications, House Committee on Interstate and Foreign Commerce. Tr. Vol. IV, p. 46 (November 10-21, 1975).

approach to state ratemaking. It is submitted that, as a consequence, the nation's policy of affordable telephone service for all will be seriously undermined. This comes about, not from an affirmative public interest determination — the circumstances are persuasive that the change is likely to be contrary to the public interest — but from the Court of Appeal's narrow construction of Section 214 of the Communications Act which frustrates the FCC's considered intention to authorize Specialized Common Carrier entry only in the private line field.

CONCLUSION

The disposition of this case will have a serious and long-lasting effect upon the ability of the Commission and other state regulatory commissions to carry out their obligations on behalf of the ordinary telephone users in their respective states. For this reason, the Commission respectively requests that this Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

4905.22 (614-12) (614-13). Service and facilities required; unreasonable charge prohibited.

Every public utility shall furnish necessary and adequate service and facilities, and every public utility shall furnish and provide with respect to its business such instrumentalities and facilities, as are adequate and in all respects just and reasonable. All charges made or demanded for any service rendered, or to be rendered, shall be just, reasonable, and not more than the charges allowed by law or by order of the public utilities commission, and no unjust or unreasonable charge shall be made or demanded, or in connection with, any service, or in excess of that allowed by law or by the order of the commission.

4905.24 (614-52). Company not permitted to exercise right of franchise where another is giving adequate service.

No telephone company shall exercise any permit, right, license, or franchise that was granted prior to June 30, 1911, but was not actually exercised, or granted after such date, to own or operate a plant for the furnishing of any telephone service, in any municipal corporation or locality where there is in operation a telephone company furnishing adequate service, unless such telephone company first secures from the public utilities commission a certificate, after public hearing of all parties interested, that the exercising of such license, permit, right, or franchise is proper and necessary for the public convenience.

4905.50 (614-63). Power to form continuous line.

The public utilities commission may, upon complaint in writing by any person or on its own initiative, by

order, require any two or more telephone companies whose lines or wires form a continuous line of communication, or could be made to form such a continuous line of communication by the construction and maintenance of suitable connections or the joint use of equipment, or by the transfer of messages at common points, between different localities which cannot be communicated with or reached by the lines of either company alone, where such service is not already established or provided for, unless public necessity requires additional service, to establish and maintain through lines within this state between two or more such localities.

The joint rate or charges for such service shall be just and reasonable. The commission may establish such joint rate or charge, and declare the portion of it to which each company affected is entitled and the manner in which it shall be secured and paid. All necessary construction, maintenance, and equipment to establish such service shall be constructed and maintained in such a manner and under such rules, with such division of expense and labor, as is required by the commission.